

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL
74-2281

United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

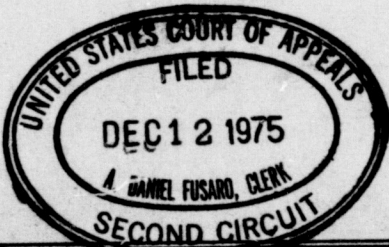
against

PENT-R-BOOKS, INC.,
Defendant-Appellant.

CONSOLIDATED APPEALS FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANT-APPELLANT.

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THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 782-6978—1975

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FOR THE SECOND CIRCUIT.

UNITED STATES OF AMERICA,

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PENT-R-BOOKS, Inc.,

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CONSOLIDATED APPEALS FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANT-APPELLANT.

Issues Presented for Review.

1. In 1968 and 1969, the Post Office issued prohibitory orders pursuant to 39 U.S.C. §4009 (Pandering Law), prohibiting mailings of advertisements by defendant to persons who had found an earlier advertisement of defendant's to be erotically arousing or sexually provocative. Did the Court below err in issuing twenty injunctions commanding compliance with those prohibitory orders, when all second mailings, made in 1969, had been involuntary, and were corrected as soon as discovered, especially since after 1969 improvements were made in the computer programming for defendant which prevented any further such mailings (subject to computer error), and, in the years immediately preceding the submission of the cases below, the defendant had not made one mailing allegedly in violation of a prohibitory order?

2. Under such facts and circumstances, was there a case or controversy within the meaning of Article III,

Section 2, of the Constitution, especially when a) the Government has been unable to suggest any improvements in the present computer programming used for defendant, b) the names and addresses of the complaining addressees had been fed into the computer previously on three separate occasions so as to prevent further mailings to them; c) there had been no such further mailings in five years; and d) under the computer programming, there was only a 0.003% possibility of another mailing by defendant, and other corporations using the same mailing list, in violation of any prohibitory order ever issued against defendant and such other corporations?

3. Is the Pandering Law constitutional, as construed and applied herein, when, in its operation and effect, it necessarily a) prohibits mailings by defendant to an estimated 8,000,000 persons whose names are on lists available for renting only, b) requires defendant to avoid mailing to 50,000 people who might desire to receive its mailings, c) results in the issuance of a mandatory order preventing even non-willful violation by the mailing of an advertisement held protected by the First Amendment; and d) the Government does not seek compliance orders unless it itself deems an advertisement to be erotically arousing or sexually provocative, thus acting as censor?

4. May a District Court grant summary judgment to the Government solely upon the basis of improperly certified Governmental administrative records, especially when a) the Government has in some of the cases never served a copy thereof upon defendant, though its omission to do so was promptly called to its attention, b) one of the certifications is clearly spurious, c) material facts appearing in that record are in hot dispute, and the defendant does not have the usual discovery methods available to it, and d) the parts of the administrative record relied on were not made by Government personnel, but by complaining addressees, and were never sworn to or affirmed?

5. Should the Government have been denied relief because it did not come into Court with clean hands, having previously manufactured evidence to permit it to carry on a pandering case?

6. Since the statute provides that a prohibitory order is effective on the thirtieth calendar day after its receipt, and that receipt of mail matter 30 days or more after the effective date of the order shall create a rebuttable presumption that such mail was sent after such effective date, was it not error for the Court below to rule that receipt of mail matter more than 30 days after the date of the prohibitory order (rather than after its effective date) created the presumption?

7. Should the Court below have granted injunctive relief when the Post Office incorrectly took default by virtue of its delay in delivering to itself defendant's hearing requests, on the ground that no points were raised in the request for hearing which were not adjudicated against the defendant, when in fact the Post Office failed to supply the defendant with enough of an administrative record to permit the defendant to raise all valid objections in its hearing request?

8. Where there were questions of facts as to the date of receipt by defendant of the prohibitory order and/or the Post Office's complaint, should not the Court have resolved all ambiguities and drawn all reasonable inferences in favor of the defendant, instead of resolving them in favor of the Government on its motion for summary judgment?

9. Is a demand for a hearing deposited with the Post Office on the 15th day after receipt of its complaint a timely demand?

10. Should an injunction have been granted to the Government in six cases in which there was no proof

whatsoever that defendant had ever received the prohibitory order?

11. Should an injunction have been granted to the Government in cases where the prohibitory order did not identify any person or persons to whom a second mailing should not be made?

12. Should the Government have been granted summary judgment in twelve cases when the second mailing was addressed to a person other than one to whom a further mailing had been prohibited?

13. Should the Government have been granted summary judgment in five cases when the second alleged mailings were sent to addresses as to which mailings had not been prohibited, in one of which the mailings was indeed to a different zip code?

14. Should summary judgment have been granted in cases where the only proof of violation was through the statutory presumption, and there was no proof of the date of receipt of the second mailing by the addressee?

Statement of the Case.

The Government moved for summary judgment in the Eastern District of New York in twenty-eight cases in which it alleged that defendant had violated the Pandering Law, 39 U.S.C. §4009, seeking injunctive orders enforcing Post Office prohibitory orders. Seven of these were resolved by the granting of defendant's cross-motions for summary judgment; the Government appealed to this Court, but later withdrew its appeals. Defendant filed notices of appeal in all 21 cases in which summary judgment was granted against it, though apparently a notice of appeal in one of those cases was not correctly entered, and accordingly there are twenty cases before this Court.

Defendant moved here for an order consolidating all 20 cases, which motion was granted by this Court.

A consolidated joint appendix has been filed, consisting of virtually the entire record in each of the cases, with the exception of omitting the Rule 9 Statements, all notices of appeal except in 69 C 1362 (since they are identical in form) and a supplemental affidavit filed in all cases, but reprinted here only in 69 C 1362, at 82a-85a.¹

Statement of Facts.

This case involves 20 appeals from orders granting summary judgment to enforce Post Office prohibitory orders issued, pursuant to 39 U.S.C. §4009, in 1968 and 1969.

The above section, popularly known as the Pandering Law, went into effect on April 14, 1968 (60a). Long prior thereto, the defendant, without any legal compulsion to do so, had always notified addressees of the nature and content of its advertisement, such notice appearing on an envelope, so that the recipient who did not want the material might mark it refused, and return it at defendant's expense (57a).²

¹This of course was pursuant to stipulation. Since the complaints are virtually identical, and since the defendant's affidavits are mainly duplicatory in all cases, defendant requested agreement from the Government to reproduce the repetitive parts of the defense affidavits only once, but the Government insisted upon reproduction of the total contents of each affidavit. To avoid burdening the Court with unnecessary detail, specific reference will be made only to the pages of the affidavits filed in 69 C 1362 where the same evidence is recited in all other cases, and citations will be made to the record in other cases only insofar as they involve additional facts or factual variants.

²When the new Goldwater Amendment to the Postal Reorganization Act of 1970 required the legend "Sexually Oriented Ad" to appear on the envelope or on an inner sealed envelope, defendant abandoned that practice, and then followed that law. See *Pent-R-Books, Inc. v. United States Postal Service*, 328 F. Supp. 297 (E.D.N.Y. 1971).

Long prior to the 1968 effective date of the Pandering Law, a computerized system was set up to comply with the terms of the law, the computer house using the services of the equivalent of 25 people working full time for six months (or the equivalent of one person working 3,000 days, or 24,000 man hours) (61a) to set up and process the system.

The system, which cost more than \$62,000 to run in 1969 (61a), was gradually improved. The first improvement was in 1970. A problem became apparent with mailing lists of adult individuals who had previously received materials similar to those disseminated by the defendant, because the only way to kill the names of complaining addressees was by putting them up on magnetic tape, and if a renter furnished a list in that fashion, he was in effect selling the list (66a-67a). The defendant was thus forced to abandon the use of many rented mailing lists, since it could mail only to persons on mailing lists available for rental only if and when such lists are on tape. The defendant estimated that between 1970 and 1973, it was thus prevented from making mailings protected by the First Amendment³ to approximately 8 million persons (68a). The second mailings here, all made prior to 1970, had been to rented mailing lists in all cases (e.g., 79a-80a).

Another problem developed from the use of duplicate mailing labels, which was eliminated in 1970 when it was found that this resulted in violations of prohibitory orders (70a). Thus, the system was carefully improved to eliminate these two sources of error.

³All the advertisements involved were for "The Photographic Manual of Sexual Intercourse," which were ruled non-obscene and constitutionally protected by Judge Masterson of the U. S. District Court for the Eastern District of Pennsylvania, in *United States v. Stewart*, unreported, Crim. No. 69-162, order dated October 13, 1971 (58a).

Another problem which had developed was that the optical scanner, used to "kill" names of complaining addressees (65a-66a), could not exercise any judgment; thus, if the name appearing on the prohibitory order was R.A. Jones, but the mailing list used the name Richard A. Jones, the computer would not recognize the name. Accordingly, in 1970, the computer was reprogrammed so that all persons with the same last name at the same address would not get mail from the defendant (71a). But this left unsolved the problems of slight variations of an address, such as a Sixth Avenue address in New York City being referred to as an Avenue of the Americas address (71a). A new improvement was accordingly made in November, 1970, under which the computer automatically removed from the mailing list the name of any person at the same address who had the same first five letters in his last name—even if such other persons had requested mailings from the sender, and even if their first names were different and they were in fact different people (72a). Thus, a prohibitory order obtained by a man by the name of Schwartz at 295 Madison Avenue in New York City would result in all mailings being stopped to that address to anyone the first five letters of whose last name was Schwa (72a).

Thereafter, a still further improvement was made, effective in the Spring of 1971, which eliminated from the mailing list the names of all persons as to whom the following three factors also appeared in the Government list supplied under the Goldwater Amendment, or in prohibitory orders: a) The first five letters of the last name coincide, b) the first three digits of the street address coincide, and c) the zip codes coincide (72a-73a). These precautions eliminated mailings even to an estimated 50,000 persons who might desire such mailings (75a), and also eliminated mailings to an A.P.O. address for any persons whose last names merely coincided. Thus, if any Smith or any Jones with an A.P.O. address

obtained a prohibitory order, mailings to *all* Smiths and Joneses at that APO address would be eliminated (75a).

The cost of the computer operation in the five years that the law had been in effect was estimated as having been more than \$300,000 (77a). But the system was remarkably effective, after the 1970 and 1971 improvements. The normal expected rate of computer error is 0.5% (65a), but although the defendant and other corporations using the same mailing lists had some 248,500 prohibitory orders issued against them,⁴ there were only some 10 administrative complaints of violation of prohibitory orders against all of them from January 1, 1972 to November 8, 1973 (64a, 80a), an alleged violation rate of less than 0.004%, assuming that all ten administrative complaints were valid (65a). Since there were at most eight valid complaints, the alleged violation rate—for a two-year period—had been cut to 0.003% for defendant and all affiliated corporations (65a). None of these complaints were against Pent-R itself. Of the total prohibitory orders issued, only about 500 complaints of violation had been upheld by the Post Office; giving the Post Office the benefit of every doubt that it decided every case correctly,⁵ less than one quarter of 1% (0.025%) of the prohibitory orders issued to defendant were ever violated. Moreover, the name and address of the complaining addressee has been fed into the computer not only when the prohibitory order was received, but a second time upon receipt of the complaint from the Post Office, a third time upon receipt of the complaint filed in the Court below (62a-63a), and, of course, a fourth time upon the entry of the judgments below.

⁴However, more than 450,000 copies of the book advertised had been sold. About 10 million advertising pieces had been mailed, and thus only about 2% of those receiving the advertisements had requested prohibitory orders (58a).

⁵The Post Office decided many of these cases solely on an alleged default by defendant, caused by the Post Office's delay in delivering mail to itself.

The Evidence Introduced in the Court Below.

No affidavits were presented by the Government from any person having personal knowledge of any fact. Instead, the Government introduced what purported to be certification of papers in Post Office files. However, in eight of the cases, copies of the moving papers served upon defendant's attorney did not contain any copy of any certification whatsoever (33a-34a, 121a-126a). The Government persisted in its failure to serve copies of these certifications despite defense counsel calling such omissions to the attention of Government counsel. *Ibid.*

In none of the "certifications" as actually filed by the Government was there any attestation; in none of them was there anything to show that the officer signing the certification had the legal custody of the record, or that he is the deputy of the person having such legal custody.

In 69 C 1362, the certification (12a) bears thereon a stamped date of 1968, though the prohibitory order itself was not obtained until 1969, and all procedural developments, according to the records certified, took place in 1969 (13a-20a).

Other details *re* "certification" are set forth, *infra*, at pages 18-21.

Additional Facts Re Administrative Records.

Evidence was advanced by the defendant showing that some persons who obtained prohibitory orders attempt to stop mail of all material they consider to be erotic (38a-39a). Additionally, evidence was presented that, in at least one case, the Post Office supplied to the complaining addressee an estimated date of the addressee's receipt of the second mailing, "In order to make a case against this" defendant, noting that its estimated date "will give us the correct waiting period to carry on this complaint" (40a-43a, 50a-55a).

The Government as Censor.

Uncontradicted evidence was set forth in defendant's moving affidavits that the Government never sought even one court order to enforce a violated Postal prohibitory order against any of the dozens of business firms advertising non-sexual products, and has sought court orders only when the first mailing was, in the judgment of the Post Office, of a sexually provocative or erotically arousing type. Thus, it was shown that, while prohibitory orders had been obtained against mailings made by such organizations as the American Civil Liberties Union and Practising Law Institute, the Post Office, and its successor the Postal Service, completely failed to go into Court to seek a court order enforcing a prohibitory order, even where there had been a violation of the prohibitory order. The defendant's defiance of the Government to show otherwise was unchallenged (28a-29a).

The Proceedings Below.

The Government moved for summary judgment in each of the twenty consolidated cases, while defendant cross-moved for summary judgment, filing one brief for all the cases.

In a series of decisions, commencing with 69 C 1362, the Court below disposed of each case on a case by case basis, relying in all cases upon its opinions in 69 C 1362 (88a), 72 C 580 (414a), 72 C 582 (577a), 72 C 588 (974a), and 72 C 606 (1616a). Additionally, some of the opinions relied upon the Court's opinions in 69 C 1290 and 72 C 609, which are not part of the Appendix. Copies of those opinions will be supplied to this Court upon oral argument. None of the opinions appear to have been reported.

In these opinions, the Court below consistently took the position that an objection not raised in defendant's demand for a hearing before the Post Office could not be

raised as a defense in Court, whether or not the Post Office had supplied sufficient information with the complaint from which the defendant could reasonably have learned of the existence of the defense.

Further factual details, peculiar to each case, will be dealt with below. Rather than analyze the cases on a case-by-case basis, we take an overview of all the cases, discussing in our first points those legal considerations which permeate all cases, and which would result in a reversal should the Court accept our arguments. We then discuss the individual details of the particular cases, whose review actually would be unnecessary should reversal be had on any of the prior generic points.

ARGUMENT.

POINT I.

No injunction should issue where, as here, it can have no practical effect, and where the Government has been at a loss to even suggest methods of preventing second mailings other than that used by defendant, while defendant's recent methods for complying with prohibitory orders have been spectacularly successful.

It is not denied that any failure or neglect to comply with any prohibitory order was involuntary. It is not denied that any error was corrected as soon as discovered, nor that its post-1969 computer programming improvements reduced its alleged violation rate to 0%, and the alleged error rate for it and other corporations using the same lists to 0.003%, either of which is better than the Post Office's error rate of higher than 1% (82a-87a) or the normal computer error rate of 0.5% (65a).

Under these circumstances, since the issuance of an injunction would have no effect by way of insuring better compliance in the future, would be unjust to the defendant and not in the public interest, an injunction should not issue. *Hecht Co. v. Bowles*, 321 U. S. 321 (1944).

The Court below distinguished *Hecht* on the ground that *Hecht*, a price control case, did not mean that *Hecht* "was not liable to refund the overcharge of each customer" (93a). But this would seem to be a distinction without a difference. If the Court below was suggesting that somehow the availability of a remedy to a disgruntled customer by going the tortuous path of obtaining a refund through the price control administrative structure somehow gave the customer a viable alternative to relief by injunction, then the first remedy to the addressees in the cases at bar is much more readily available. Without having to seek the intervention of any government agency or take action in Court, the complaining addressee is always at liberty to discard the second mailing into the nearest waste basket—a far more effective and easily available remedy. Additionally, as complaining addressees have been advised, " * * * you may always exercise your right under the provisions of Section 154.11 of the U. S. Postal Service Manual, to control delivery of your mail by refusing to accept it at the time it is offered for delivery. Also, after delivery, you may mark any matter 'Refused' and return it unopened to the mails, except registered, insured, certified or COD mail." Letter from U. S. Postal Service, Office of the Inspector in Charge, Newark, N. J., to Mr. R. L. Wolke, dated December 23, 1974, page 2.

And, more importantly, the Court below simply ignored the law that an injunction should not issue when vigorous steps had been taken to prevent recurrence of mistakes or further mistakes in the future, and when the issuance of the injunction would have "no effect by way of insuring better compliance in the future," that it would be "unjust" to the defendant and not "in the public interest." 321 U. S. at 326.

The reasons for not issuing an injunction here were much stronger than in *Hecht*. Here, unlike *Hecht*, the defendant had attempted to bring itself into compliance

with all the requirements of the law prior to its effective date. Here, there was overall compliance with the statute at least 99¾% of the time, with the maximum possible violation rate for the years after improvements in the computer programming having been 0.003%, or a compliance rate of 99.997% (62a-65a). Here, of course, the issuance of an injunction would not and could not have any effect of insuring better compliance in the future. A computer, which functions more effectively than humans could possibly function, cannot hear the command of an injunction. It could hear better programming, but the Government has never been able to come up with any suggestion for that.

In *Hecht*, it was concluded that it would be unjust to issue the injunction—and we suggest that here, where the defendant spent more than a quarter of a million dollars to insure compliance with the law, and indeed has had to eliminate mailings even to persons who would want defendant's mailings, it would be simply unjust to the defendant to have an injunction issued against it. In this connection, we note that all the cases here involve orders issued in 1968 or 1969, and that, in the six years since the Post Office complaints were originally issued, there have been no further mailings to *any* of the complaining addressees—even in the absence of a court order.

Hecht ruled that the standards of public interest, not the requirements of private litigations, measure the propriety and need for injunctive relief, noting that inflation was the most destructive of war's consequences, except human slaughter, and yet approved the denial of injunctive relief. *Id.* at 331. In the cases at bar, the worst consequence that would follow in the absence of an injunction would be, conceivably, that another mailing would be made—though this has not occurred in six years—and the only real consequence would be that the addressee could toss the mailing into a waste basket.

Public interest in the granting of an injunction is singularly lacking. Thus, during fiscal 1969, less than 1% of sexually oriented advertising resulted in a prohibitory order, that is, between 0.67% and 0.72%. Volume 3, *Technical Report of the Commission on Obscenity and Pornography*, page 163. Thus, the public interest affects less than three-quarters of 1% of the population, or, in all *Pent-R* and related cases, some 500 persons out of a total of 200 million, or 0.0002% of our population. Surely, the doctrine of *de minimis* would seem to preclude the issuance of any injunction here.

Moreover, the language of the statute in *Hecht* required that in cases of violation, an injunction "shall be granted," while in these cases, the underlying statute does not even purport to require the issuance of an injunction, merely authorizing the Postmaster General to request the Attorney General to apply for an order, and merely authorizing the Attorney General to make such application. That language of subsection (d) is immediately followed by the language of subsection (e), which gives jurisdiction to the District Court to issue an order, but does not contain any mandatory requirement that the Court issue an order. As the Court stated in *Hecht*, *id.* at 329:

"A grant of *jurisdiction* to issue compliance orders hardly suggests an absolute duty to do so under any and all circumstances. We cannot but think that if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made." (Emphasis the Court's.)

The Court went on to note that issuance of an injunction is designed to deter, not to punish (*id.* at 329-330). But no purpose of deterrence can possibly be served by the issuance of the injunctions below. The deterrent efficacy of those injunctions is exactly 0%, for there is no way to deter computer (or, indeed, human) error. The defendant threatens no improper conduct, and, on the

other hand, has purposely refrained from making mailings which it has a constitutional right to make in order to be able to comply with the prohibitory orders.

Issuance of the compliance orders below was error.

POINT II.

Any case or controversy which ever existed within the meaning of Article III, Section 2, of the Constitution is now moot. Issuance of an injunction here would further violate the First Amendment.

The test of whether there is a case or controversy depends upon whether "the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Golden v. Zwickler*, 394 U. S. 103, 108 (1969). There, the high Court found that the possibility that a then sitting New York Supreme Court Justice would be again a candidate for Congress was so unlikely that the Court should not consider a New York statute's prohibition of anonymous hand bills for election campaigns. In the case at bar, with the recent error rate of at most 0.003%, the odds against any complaining addressee receiving a second mailing from defendant are approximately 33,333 to 1, substantially greater than the odds against a sitting Justice, formerly a Congressman, once more running for Congress. Thus, the controversy here—if it can be said that there is a controversy, since the improvements made after 1969 in the defendant's computer system—is of substantially less immediacy and reality than that in *Golden*. Since the Post Office has adjudicated a total of some 500 violations, the percentage error rate applied to these 500 persons (multiplying 0.003% by 500) shows that only 0.015% of a person would stand a statistical chance of ever receiving another mail-

ing from the defendant. We submit that a controversy affecting substantially less than one person is one of neither immediacy nor reality.

In any event, all these cases would seem to be now moot under law, because the injunction, if rendered, "cannot have any practical legal effect upon the existing controversy." *Ex parte Steele*, 162 Fed. 694, 701 (1908). Had injunctions issued in 1969 or 1970, they would undoubtedly have had the effect of requiring and achieving improvements in the defendant's computer programming. But those improvements were all made voluntarily in 1970 and 1971, and an injunction now is a wasted piece of paper. Moreover, the names and addresses of the complaining addressees have been fed into the computer's "kill" list four times, and feeding them in again—all that can be done by way of compliance—would be a useless gesture.

POINT III.

The statute, if construed and applied to the mailings here, would violate the First Amendment, for it is not so narrowly drawn as to permit compliance therewith without substantially interfering with defendant's First Amendment rights, and further penalizes non-willful violations by one exercising First Amendment rights.

As may be noted from the factual recital below at pages 46-48, a substantial number of cases were caused by the computer's inability to recognize that a Richard A. Jones is the same person as an R. A. Jones, or a Dick Jones. The existence of this problem was later recognized by Congress under the Goldwater Amendment to the Postal Reorganization Act, 39 U. S. C. §3010, providing for a listing by the Government of persons who do not wish to receive sexually oriented ads from any source.

The Post Office form, in accordance with that statute, advises the addressee as follows:

"The name that you insert in the space provided should be the name by which you customarily receive mail. You may, if you wish, file separate applications for varying forms of your name."

The listings then supplied to the mailers contain all such varying forms. Had the statute here provided for the supplying of alternative name formulations, with the provision that only those name formulations could not be mailed to, the statute as narrowly drawn would have permitted many more mailings, and would not have necessitated the inability of the defendant to make mailings to persons of the first five letters whose names may coincide with those of complaining addressees in the same zip code area. If the statute is construed to be so narrowly drawn, then a number of the constitutional problems posed in these cases will be gone. Since the end of the statute could have been achieved without depriving defendant of the right to mail to many, the statute is unconstitutional. *Louisiana v. N.A.A.C.P.*, 366 U. S. 293, 296 (1961); *Shelton v. Tucker*, 364 U. S. 479 (1960); *Blount v. Rizzi*, 400 U. S. 410 (1971). The statute could be saved by construing it to mean that it does not apply to names on rented lists, and that it applies only to mailings to persons on non-rented lists whose names are identical with those name formulations listed upon the prohibitory order.

In any event, there is neither claim nor showing that any violation in this case has been willful, and, if the statute be upheld to penalize a non-willful mailing, then it is unconstitutional, because defendant was mailing only advertisements protected by the First Amendment. *Time, Inc., v. Hill*, 385 U. S. 374, 389. For what the Court formulated below was not a willfulness test, nor a negligence test, but an impossible burden of verifying to a 100% certainty—99.997% not meeting its test—that mail does not go to a complaining addressee.

The statute has already caused the defendant to steer clear widely away from the forbidden zone by computer elimination of mailings to many persons who may want to receive the defendant's mail; penalty should not be visited upon the defendant for not performing the impossible.

The Court below reasoned that our argument had been disposed of in *Rowan v. United States Post Office Department*, 397 U. S. 728 (1970) (94a-95a, 99a-100a). But none of these considerations were before the Court in *Rowan*, which was a test case brought within a few days after the Pandering Law took effect. Thus, the operation and effect of the statute—which is what we complain of here—was not before the Supreme Court in *Rowan*.

POINT IV.

Since all administrative records supplied by the Government were unsworn to, improperly certified, and not authenticated, they were inadmissible in evidence. Thus, the entire foundation upon which the injunctions rest is totally lacking.

The Court below did not deny our contentions as to improper certification and authentication. Instead, the Court below ruled that every instrument in the administrative record was communicated by copy to the defendant during the administrative proceeding (101a). But this is simply untrue, except in the few cases where hearings were held. Thus, in 72 C 584, no exhibit whatsoever was annexed to the Post Office complaint (635a-636a, 667a); in other cases, only a copy of the prohibitory order was annexed [72 C 581 (466a, 494a), 72 C 586 (762a), 72 C 588 (937a, 966a), 72 C 600 (1212a, 1240a), 72 C 601 (1302a, 1329a)]; in other cases, copies of the prohibitory order were not annexed [e. g., 69 C 1363

(313a)]. In none of the cases was any of the requests for prohibitory orders annexed, nor the return receipts for the prohibitory orders.

But in any event, the Court below somewhat missed the point. Even if a copy of every part of the administrative record had been communicated to the defendant during the administrative proceeding, it was not admitted into evidence before the Post Office, and could not in any event be introduced in evidence in the Court below, because not properly authenticated. *Celanese Corp. of America v. Vandalia Warehouse Corp.*, 424 F. 2d 1176 (7th Cir. 1970). What the Court below ruled was that a document becomes admissible in evidence in Court simply because a copy of it has previously been furnished to a party during an administrative proceeding. But that is not the law.

The Court below recited that defendant did not say that the administrative record was not a true copy of the record (101a). Of course not: Not only would the defendant have no way whatsoever of knowing whether any part of the administrative record (other than the prohibitory order and complaint) was a true copy, but defendant need not deny the legitimacy of an exhibit in order to prevent admissibility. Admissibility must always be ruled upon prior to determination of validity. And here, the certification was lacking or improper in all cases:

In eight cases (69 C 1362, 72 C 584, 72 C 602, 72 C 603, 72 C 606, 72 C 610, 72 C 611, 72 C 612), copies of the Government's moving papers, as served upon defendant's attorney, did not contain any certification whatsoever, though the Government's notice of motion referred to a certification (e. g., 33a-34a). The Court below, noting this uncontradicted statement, ruled that as a matter of normal courtesies between counsels, defense counsel

should simply have drawn these slips to the attention of the United States Attorney, not to raise it months later (101a-102a). In an informal rehearing petition, defense counsel noted that he had indeed promptly drawn this slip to the attention of the United States Attorney, but that the slip had gone entirely unremedied (121a-126a). This made no difference in the decision (119a-120a).

Wherever there was a purported certification, it was improper and inadequate, because it did not contain a proper authentication.

Rule 44(a) of the Federal Rules of Civil Procedure, dealing with authentication of a domestic official record, requires attestation, a showing in the certification that the officer signing it has the legal custody of the record, or that he is the deputy of the person having such legal custody, and that the person signing the certification have his own seal of office. None of the certifications here complied with any of these requirements.

The reason for what would seem to be otherwise a remarkable oversight is that all certifications were made by an official in Washington, D. C., though the persons having custody of the records are those in charge of 64 Postal Service Centers across the country (167a). Only such respective persons could properly have certified and attested, but none of them did.

The certifications are otherwise defective. Thus, the certification in 69 C 1362 (12a) merely certifies that the attached papers are true copies, but does not say of what. Moreover, the stamped date on the certification is August 18, 1968—though the documents certified are all dated in 1969. This certification is surely spurious.

In 72 C 579, only the order finding the violation is certified (138a-140a), as is the case also in 72 C 580 (329a). In 69 C 1363, the certification is in blank, and fails to tell us what is certified (243a), as is the case in 72 C 581 (426a), 72 C 582 (508a), and 72 C 584 (588a). And in the remaining cases, all that is certified is the Post Office docket number (684a, 776a, 876a, 992a, 1086a, 1168a, 1256a, 1344a, 1440a, 1534a, 1624a, 1724a, and 1826a).

In a prior case in the Eastern District, *United States v. Book Bargains, Inc.*, Docket No. 68 C 1266, the Government had found it impossible to obtain proper certification. The Government thereupon abandoned the case. We perceive no reason why an injunction should issue here when the Government has not supplied proper certification. Accordingly, the decisions below should be reversed and defendant's cross-motions for summary judgment granted.

POINT V.

Even were there proper certification, none of the purported evidence relating to date of receipt of the second alleged mailings is admissible, and therefore summary judgment should have been granted to the defendant in all cases.

Under Rule 44, even properly certified material is not automatically admissible. The "evidence" allegedly found in the Government's files to show the alleged date of receipt of the second mailings (none of the mailings whatsoever bearing any postmark) is, we submit, inadmissible.

Admissibility of those hearsay and unsworn notations was upheld below on the theory that these notations were admissible nonetheless under the Federal Business Records Act [28 U. S. C. §1732(a)].

Quite apart from the fact that the Post Office is in violation of its own rules of practice when it takes an unsworn notation as to date of receipt, as evidence,⁶ materials are not admissible under the Business Records Act unless there is competent evidence to establish that the document was prepared in the regular course of the business of the person who prepared it. Thus, a letter from a third person which is found in the file of an addressee is not prepared by the addressee, and therefore plainly is not admissible as a business record of the addressee. *Hussein v. Isthmian Lines, Inc.*, 405 F. 2d 946, 947-8 (5th Cir. 1968); *Cromling v. Pittsburgh and Lake Erie R. R. Co.*, 327 F. 2d 142, 146-8 (3rd Cir. 1963). While we do not deny that those parts of a properly certified administrative record actually prepared by the Government would be admissible as a record of the Government, those parts of the administrative record are not admissible which contain the alleged notation of the alleged date of receipt by the complaining addressee of the second mailing.

Moreover, these notations are not an "official record," and hence may not be introduced in evidence under Rule 44. Additionally, there is an inherent unreliability in the unsworn notations as to date of receipt. Firstly, one cannot tell to what extent they are influenced by a Postal official or letter carrier in order to be able to continue the prosecution of the case, and secondly, the type of person who seeks to obtain a prohibitory order is frequently the type of person who wants to cause as much trouble as possible to the mailer of the materials (38a-40a).

⁶Rule 956.7(a) of the Post Office Rules of Practice provides that "Testimony shall be under oath and witnesses shall be subject to cross-examination." Cross examination has never been available in these cases. An attempt to take the deposition of the complaining addressee was denied by Judge Weinstein of the Court below in *United States v. Book Bargains, Inc.*, Docket No. 68 C 1266; Judge Weinstein certified the case for purpose of an interlocutory appeal, which was taken but not allowed by this Court.

Under the decision below, procedures under the Pandering Law are totally unique: The unsworn word of a person having an interest in the case, not subject to confrontation or cross examination, is enshrined as an irrefutable truth, thus denying the defendant the right to cross examine and confront its accusers under the Sixth Amendment, and depriving it of liberty and property without the due process of law required by the Fifth Amendment.

The answer of the Court below was that the defendant could have protected itself against imposition by dating its envelopes (104a). But the question is not whether the defendant could or should have so protected itself, for the law has never so required. The point is that the Government here obtained compliance orders in the total absence of any competent admissible proof that there had been a violation. There being no requirement under the law that a mailer date its mailings, we perceive no reason why the mailer is expected to come forth with proof of the date of mailing when the Government fails to make out even a prima facie case, by any admissible evidence, that a violation has occurred. What the Court below has done is to shift the burden of proof to the defendant mailer, and ruled that in the absence of such proof, inadmissible, unsworn hearsay statements may be considered on the part of the Government, all without proper certification—a unique rule of law which we have never before ever heard suggested, and for which the learned Court below supplied no citation.

POINT VI.

Injunctive relief should have been denied to the Government because it did not come into Court with clean hands, having previously manufactured evidence to be able to carry on a complaint.

As noted in an opinion of the Court below (108a-109a), the Government in one or some or in all of the cases had used a prepared typewritten or mimeographed form which advised the complaining addressee that in order to make a case against the mailer, the Post Office had to have a signed statement as to the date of delivery of the second letter, noting that the date given was an estimated date, but which would give the Post Office the correct waiting period to carry on the complaint. Such form was shown as an exhibit at the administrative hearing in 69 C 1362 (47a, 49a-55a).

We contended below that the Post Office, which could not have its own knowledge of the date of receipt by the addressee of the second mailing, could not have estimated the date for the complaining addressee. In rejecting this argument, the Court below noted that there must have been a second mailing—which of course we never denied—and ruled that “The explanatory material on the statement is correct; the suggestion of date, which the addressee is warned is an estimated date, is plainly related to the date of the addressee’s complaint to the Post Office” (109a). But this is patently wrong. The document speaks for itself, and the date is plainly related to making the date of receipt more than 30 days after the defendant’s receipt of the prohibitory order, so as to give the Post Office “the correct waiting period to carry on this complaint” (108a). There is simply not a scintilla of evidence in the record to show that the date suggested is related to the date of the addressee’s complaint to the Post Office, rather than to a date making continued prosecution of the claim possible, as the Post Office itself

stated was the purpose of the suggested date. Nor, indeed, was there the slightest scintilla of evidence that the date suggested was related in any way to the date of the addressee’s complaint to the Post Office—and, even if it was related to the date of the addressee’s complaint to the Post Office, the Post Office was still manufacturing evidence, for there was no reason for the Post Office to have believed that there was a relationship between the date that the second mailing was received by the addressee and the date of the addressee’s complaint to the Post Office. There might have been a substantial difference in time between the receipt of the mailing by the addressee and his transmission of it to the Post Office, especially since the suggested date (August 27, 1969) was in the summer, when people do take vacations.

Governmental misconduct here has infested each and every one of the pending cases. Thus, injunctive relief should be denied for the simple reason that the Government did not come into Court with clean hands.

POINT VII.

Experience under the statute has shown that the Government acts as censor in seeking compliance orders only where it believes the mailings to be sexually oriented. The statute as so administered must fall as being violative of the First Amendment in its operation and effect.

At the time that *Rowan, supra*, was decided, there was no history of operations under the Pandering Law before the Supreme Court. However, in all cases at bar, we alleged—without contradiction—that, according to the report of a Presidential Commission, prohibitory orders were issued against nearly 400 separate firms mailing sexually oriented materials, and that orders were also issued against dozens of business firms advertising non-

sexual products (28a). We further alleged that " * * * the Government has not sought even one Court order to enforce a postal prohibitory order against any of the dozens of business firms advertising nonsexual products. It has sought court orders only when the first mailing was—in the judgment of the Post Office—pandering, *i. e.*, of a sexually provocative or erotically arousing type. Thus, for example, I [the undersigned] have received information, and therefore allege, that while prohibitory orders have been obtained against mailings made by such organizations as the American Civil Liberties Union and the Practicing Law Institute—neither of which mail any material which would conceivably be called sexually provocative or erotically arousing—the Post Office and its successor, the Postal Service, have completely failed to go into Court to seek a Court Order enforcing a PO, even when there has been a violation of the PO. We defy the Government to show otherwise" (29a). Not only did the Government fail to show otherwise, but it completely failed to deny any of these allegations. The Court below, however, rejected our argument on the ground that " * * * it does not appear on defendant's showing that such episodes have occurred in circumstances or to an extent sufficient to support a claim that the administration of the statute has converted it into an instrument for Post Office censorship of mailings of sexually oriented advertisements" (96a-97a).

We ask, in all candor, why have we not shown this, when we have alleged that dozens of business firms have had prohibitory orders issued against them *re* nonsexual mailings, that there have been violations, and that not even one of these alleged violations has resulted in a court suit for compliance? The information that we alleged was totally undenied, and we fail to understand how anything more could ever be shown than we showed, or why anything more need be shown than a totally discriminatory pattern in seeking compliance orders. Surely, the Government had some duty to come forth with any

facts or figures which might have disproved our contentions, but it chose not to deny them, or qualify, or explain, them.

The very basis upon which the constitutionality of the Pandering Law was upheld in *Rowan* was that the individual complaining addressee, not the Government, acted as censor. But the later developments recited in the undersigned's affidavit did show that the operation and effect, in practice, of the statute is that the Government is indeed the censor, in violation of the Constitution—for Postal censorship is of course unconstitutional. *Blount v. Rizzi*, 400 U. S. 410; *Lamont v. Postmaster General*, 381 U. S. 301.

Since the Government selectively determines in which cases it should seek a compliance order, and since nothing can happen to a mailer unless and until it violates the judicial compliance order, it is quite clear that Post Office censorship is being used in the place and stead of the discretion of the complaining addressee. The law, as construed and applied, and in its operation and effect, thus in reality vests the Government with the power to make discretionary evaluations of material, and to determine which advertisers to move against, on the basis of the type of materials advertised—which it has done. The statute is thus repugnant to the First Amendment and deprives defendant of its First Amendment rights, is repugnant to the due process of law required by the Fifth Amendment, and deprives defendant of the equal protection of the laws under the said Fifth Amendment as well.

POINT VIII.

Since the Government did not prove that any mailing was made more than thirty days after the effective date of the prohibitory order, in any of the cases, summary judgment should have been denied to the Government in all cases. In cases where the second mailings were received less than sixty days after the date of defendant's receipt of the prohibitory order, summary judgment should have been granted to the defendant.

We shall show below (*infra*, pp. 41-44) that, in a number of cases, there was no proof of the date of receipt by the defendant of a prohibitory order; we have already shown that the administrative record considered by the Court below was neither competent nor admissible (*supra*, pp. 18-21). But in this point, we assume, solely for the purpose of argument, that there was proof of defendant's receipt of the respective prohibitory orders. Nonetheless, we contend herein, there is a lack of viable proof in all cases that the second mailing was made more than thirty days after the effective date of the respective prohibitory order. Therefore, there was lacking sufficient proof of a violation to warrant granting the Government summary judgment, for a variety of different reasons in different cases, though there is some overlapping. To elucidate:

In all cases, the second mailing was made by first-class, prepaid mail,⁷ so that there is neither postmark nor cancellation to show the date of mailing. Accordingly,

⁷The Court below wrote that:

"It may be that defendant's envelopes are not postmarked and so do not disclose mailing dates. It is evident from examination, however, that the defendant's mailed envelopes are metered or prepaid envelopes * * * (104a).

Not one of the envelopes involved in any of the cases were sent by metered mail; metered mail would have shown the date of mailing.

the only way the Government can show that the defendant mailed more than 30 days after the effective date of the prohibitory order—which, of course, is 30 days after its receipt by defendant—is by proving the date that the addressee received the second mailing. In each case, however, the proof is totally defective, in some cases for more than one reason.

A. In seven cases, the second mailings were clearly received less than 60 days after defendant's receipt of the prohibitory order. Thus, the statutory presumption that the mailings were made after the effective date of the prohibitory order was not applicable, and there is no evidence as to the date of the second mailing.

Under (c) of the statute, the prohibitory order is "effective on the thirtieth calendar day after receipt of the order."

Under (f) of the statute, it is provided that "Receipt of mail matter 30 days or more after the effective date of the order provided for by this section shall create a rebuttable presumption that such mail was sent after such effective date." (Emphasis supplied.) Thus, the effective date of the order is 30 days after its receipt, and the presumption does not arise unless mail matter is received 30 days or more after such effective date. The statutory presumption thus does not arise unless the second mailing is received 60 days or more after the defendant's receipt of the prohibitory order—a combination of the two thirty-day periods.

Since there are no postmarks on the second mailings, there is neither proof nor presumption in these cases that the second mailing was made more than 30 days after receipt of the prohibitory order, and the defendant's motion for summary judgment should have been granted.

Thus it is clear that, in these seven cases, there was no proof whatsoever of violation,⁸ and summary judgment should have been granted.

The Court below disposed of our argument by first noting that it would not have been difficult for the defendant to protect itself against imposition by dating its envelopes (104a). But this, of course, is totally irrelevant: The Government is still put to its proof, and the Government failed to meet the conditions of the statutory presumption. But the Court went on to construe the statute by the novel doctrine that Congress had made "a semantic slip in the phrasing of subdivision (f) . . ." (107a). To do this, the Court below quite literally struck out the word "effective" from the statute in its first occurrence in the expression "effective date" in subsection f, and rewrote the statute to read "Receipt of mail matter thirty days or more after the date of the order . . . shall create a rebuttable presumption that such mail was sent after [the] effective date" of the prohibitory order (105a). Not only had the Government never suggested this theory, nor had it any time suggested that judicial surgery was necessary to correct a Congressional and Presidential "semantic slip," but there simply is no rule of statutory construction which authorizes a Court to rewrite a statute by striking out a key word. On the contrary, the striking of a word from the statute on the theory that Congress made a "semantic slip"—without any evidence to support such theory—flies in the face of the rule of statutory construction too well known to even merit citation here, to wit, that every word in a statute must be given meaning. Yet what the Court below did was to read a key word out of the statute entirely.

⁸The cases referred to, and the relevant citations therein, are: 1) 69 C 1362 (15a, 16a); 2) 69 C 1363 (247a, 248a); 3) 72 C 587 (782a, 785a); 4) 72 C 588 (880a, 888a); 5) 72 C 598 (1002a, 1003a); 6) 72 C 601 (1262a, 1260a); and 7) 72 C 602 (1351a, 1359a).

After the decision below was rendered, the undersigned wrote the learned Court, noting the distortion of the statutory scheme if the word "effective" is to be read out of the statute (123a): Thus, if a prohibitory order was dated January 2, 1974, and received by a mailer on February 1, 1974, and the second mailing was received by the addressee on February 1, 1974, the presumption would be that the second mailing was made on February 1, 1974. The mailer would have been given *no* time to comply with the prohibitory order, though the statute gave the mailer 30 days in order to comply.

Another illustration springs to mind. Suppose, for example, that a prohibitory order was dated November 24, 1975, mailed the day before Thanksgiving, that is, November 26, 1975, and received by the mailer on December 1, 1975. Then, any mailing received more than 30 days after the date of the prohibitory order would be deemed in violation of the statute. Thus, if the mailer mailed the second mailing piece on December 22, 1975, only 21 days after he had received the prohibitory order, he would be deemed in violation of the statute if the addressee received the mailing on the day after Christmas, 1975, December 26, 1975—though the mailer would have had until January 1, 1976, to comply.

As the statutory presumption was thus rewritten by the Court below, it becomes arbitrary, and unreasonable, since it is totally illogical, and does not give to the mailer the 30-day grace period that has been recognized as the mailer's rights not only by *United States v. Lange*, 466 F. 2d 1021 (9th Cir. 1972) at 1023, but which the learned Court below itself recognized existed.

The Court below went on to note that when the complaint was sent to a mailer, he was reminded of the date of the prohibitory order and is supplied with a copy of the envelope in which the allegedly violative material was enclosed (107a). Not necessarily so. Indeed, in a number of cases, the record is clear and uncontradicted that

a copy of the second mailing envelope was not supplied with the complaint.⁹ The Court notes that the defendant then has the right to make an issue on the point, and at that juncture to come forward with evidence of mailing, or at the administrative hearing (107a-108a). But there is no reason for the defendant to come forward with evidence showing lack of violation, at any time, when the plaintiff has failed to produce any competent admissible evidence in support of its position that a violative mailing occurred.

B. *In another case, 72 C 600, there was insufficient proof of date of receipt.* The second mailing bears this legend:

"this letter received approx July 10, 1969" (1172a).

The prohibitory order was allegedly received by defendant on May 9, 1969 (1171a). This is a difference of approximately 62 days. The legend could mean 59 days, or less, and in the absence of the Government producing at least an affidavit from the addressee, it cannot be told what the addressee meant by "approx." Thus, summary judgment should not have been granted to the Government in the absence of any proof as to just when the second mailing was received.

C. *In one case, there was insufficient indication of the date of receipt by the addressee (72 C 580).*

In this case, there was no indication whatsoever as to the date of receipt of the second mailing. There was merely endorsed upon the second alleged mailing envelope a date, with what purports to be the signature of the addressee (333a). There is no way of ascertaining whether this date is supposed to be the date of receipt of the second mailing, the day on which it was turned

⁹E. g., in 72 C 581 (466a, 494a); 72 C 584 (635a-636a); 72 C 586 (762a); 72 C 588 (937a, 966a); 72 C 600 (1212a, 1240a); 72 C 601 (1302a, 1329a).

over to the Post Office, written on the envelope for purposes of identification, or indeed, what date it purports to be. Nor, indeed, is there anything to indicate that it was taken immediately to the Post Office, without any intervals for vacation, illness, preoccupation with other matters, temporarily mislaying the envelope, inconvenience of Post Office hours, or a host of different reasons.

In this type of situation, where the proof is unclear as to when the addressee received the second mailing, the Government's motion for summary judgment should have been denied. *United States v. Lange, supra.*

D. *In three cases, the handwriting allegedly showing date of receipt does not match handwriting specimens of the addressee elsewhere in the administrative record.*

In three cases—72 C 579, 72 C 606, and 72 C 611—the handwriting showing the purported receipt date which appears on the second alleged respective mailing envelope (145a, 1538a, 1729a) does not appear to be the same handwriting in which the respective complaining addressee made his original request for a prohibitory order (150a, 1542a, 1745a). Indeed, these handwritings are quite different.

In 72 C 606, moreover, the style of setting forth the date on the request (Notice) for prohibitory order is the Continental style of the day of the month, followed by the month and the year, while the notation on the second mailing envelope is given in the American style giving the month, followed by the date and the year. Force of habit would preclude a person from writing the same thing in two such totally different ways on two different documents. Certainly, this was enough, in and of itself, to have warranted a denial of summary judgment here.

E. *In eight cases, there is neither showing nor indication of date of receipt of the second mailing.*

In these cases, the alleged receipts purporting to show the dates of receipt, purportedly signed by the complaining addressees, do not clearly show the date they were received.¹⁰ They merely recite the word "received" or a word or words to such effect, with the next line setting forth the name or initials of the addressee. This may well show the date the Post Office received the material from the complaining addressee, rather than the date that the complaining addressee received the second mailing from defendant. Certainly, this does not constitute sufficient proof that this was the date of the receipt by the complaining addressee of the defendant's second mailing. *United States v. Lange, supra.*

F. In six cases,¹¹ there are two different sets of handwritings on the envelopes, one showing the alleged date of receipt, and one showing a signature underneath. It is thus impossible to tell whether the date of receipt was perhaps inserted by the Post Office, picking a day to permit it to prosecute the case, or by the addressee. It may be that a trial would disclose this, with an opportunity to examine the complaining addressee, and summary judgment should have been denied to the Government in these cases. *United States v. Lange, supra.*

G. In four cases, there is no indication whatsoever of the date of receipt of the second mailing, no date whatsoever being set forth.

There is no showing whatsoever of the date of receipt of the second mailing in 72 C 580 (333a), 72 C 582 (512a), 72 C 586 (693a) or 72 C 603 (1455a). Therefore, there was no showing whatsoever of the alleged date of the second mailing, by presumption or otherwise, and sum-

¹⁰The cases, and the alleged receipt in those cases, are as follows: 69 C 1363 (247a); 72 C 579 (145a); 72 C 587 (782a); 72 C 599 (1090a); 72 C 600 (1172a); 72 C 602 (1351a); 72 C 611 (1729a); 72 C 612 (1831a).

¹¹72 C 579 (145a); 72 C 598 (1002a); 72 C 600 (1172a); 72 C 602 (1351a); 72 C 606 (1538a); 72 C 611 (1729a).

mary judgment should have been granted to the defendant, since the Government completely failed to produce any proof whatsoever of violation.

In one of these cases, 72 C 603, the hearing officer did find that the second mailing was received on the specific date of June 5, 1969 (1441a)—but there was not a scintilla of evidence to support this factual finding.

H. In another case, the only indication of date of receipt came not from the addressee, but from a purported relative thereof.

In 72 C 610, the indication of the date of receipt of the second mailing was set forth by a person apparently related to the complaining addressee (1628a) rather than by the complaining addressee personally (1630a), shows when the relative received it, but does not show when the complaining addressee received it, and therefore is totally valueless to put the presumption into play. The Government's motion for summary judgment should have been denied.

I. In eleven cases, the date of receipt was purportedly indicated, but there was nothing whatsoever to show that the complaining addressee was the one who received it on such date.

In seven cases, the proof of date of receipt of the second mailing merely purports to show the date upon which it was received [69 C 1362 (16a); 69 C 1363 (247a); 72 C 579 (145a); 72 C 581 (430a); 72 C 588 (880a); 72 C 598 (1002a); 72 C 599 (1090a); 72 C 601 (1260a); 72 C 602 (1351a); 72 C 611 (1729a); and 72 C 612 (1831a)]. But in no way, shape or form does the receipt purport to show who received it on that date. It could have meant received by the Post Office, by the addressee, or by anyone, and, moreover, there is simply no signature, or even a

postal stamp, to vouch for the date of receipt—even by the Post Office.

Moreover, in 69 C 612, the second envelope was open on arrival (1831a). It is impossible to tell through how many hands it had previously passed.

POINT IX.

In eight cases, the Post Office failed to give adequate notice of the charges.

Though the Post Office form of complaint recites that exhibits showing a violation of the prohibitory order were annexed, they frequently were not annexed. Thus, in 72 C 579, the only exhibits annexed were copies of the prohibitory order and the second (but not the third) alleged mailing envelope (181a, 210a). In 72 C 584, no exhibits whatsoever were annexed (635a-636a, 667a). In 69 C 1363, no copy of the prohibitory order was annexed, but only copies of the alleged mailing envelopes (313a). And in a number of cases, the only exhibit annexed was a copy of the prohibitory order: 72 C 581 (466a, 494a), 72 C 586 (762a), 72 C 588 (937a, 966a), 72 C 600 (1214a, 1240a), and 72 C 601 (1302a, 1329a).

This denied defendant its right to know the nature and cause of the accusation against it, in violation of the Sixth Amendment, and deprived defendant of liberty and property without the due process of law required by the Fifth Amendment. The Post Office proceeded most unfairly when it did not give the notice that its forms require.

The Court below disposed of this problem by ruling that it was enough if the Post Office complaint had annexed to it the second mailing envelope and some part, however fragmentary, of the second advertising brochure (*United States v. Pent-R-Books, Inc.*, 69 C 1290, p. 4).

It then went on to rule that denial of administrative hearings and appeals was harmless error, in cases where no points of substance were made in the requests for a hearing. However, when inadequate documentation was annexed to the administrative complaint, obviously not all defenses can be raised. When the defendant is not fully informed of the nature and cause of the accusation, obviously the request for a hearing cannot make all the objections that could be made if a full administrative record had been disclosed. To rule that the Government need not disclose all the material facts of the complaint, and then to rule that the defendant has waived defenses which it might have raised had full disclosure of the administrative record been made, is to do double violence to due process: Not only is the Government not required to disclose the nature and cause of the accusation, but its nondisclosure may be a basis for determining that a defense based upon undisclosed material is no longer available to a defendant.

While the Court below apparently did lay down the ruling that it was enough to have a copy of the second mailing envelope plus some fragment of the advertising brochure annexed to the complaint, it nonetheless departed from this principle in upholding the issuance of injunctions in which these conditions were not satisfied. We do not know the explanation thereof.

POINT X.

The Court below incorrectly approved the Post Office taking default by virtue of its own delay in delivering mail to itself, and thus improperly denied defendant administrative hearings.

Despite the fact that the statute and regulations required that a demand for hearing be addressed to the Postmaster General, the Post Office improperly and illegally required in its complaint form that the demand

for a hearing be addressed not to the Postmaster General, but to the local Postmaster, or to someone at the local post office. Each and every complaint so reads. Thus, all complaints were not in accordance with the statute, and were hence illegal; hence, any delay in submitting a demand for a hearing should be excusable. In any event, defendant made a point of sending in its demands for a hearing no later than the 14th day after receipt of the complaint, with adjustments for holidays or weekends.

But about a year after the operation of this statute began, the Post Office suddenly began to take the words of the statute literally, and would not deem a demand for hearing as being filed until it actually arrived at a particular postmaster's office (163a-166a). We submit that any deposit in the mails of a demand for a hearing made within 15 days after the date of receipt of the administrative complaint should be sufficient, since certainly material has been filed with the Postmaster General—as the statute requires—when it is put in the mails. It is in the custody of the Postmaster General, and it would indeed be a federal crime for anyone to take it from his custody. Thus, it was filed with the Postmaster General as soon as it was deposited in the mail.

The Court below, in 69 C 1290, approved the denials of hearing and appeal, as being harmless error, because the demands for hearings made no point of substance—which brings us back to our prior point that no points of substance could have been raised at that stage where the administrative records supplied to the defendant were far from complete. (It was always the practice of the Post Office to disclose the complete administrative record to the defendant shortly before a hearing was held. Thus, points of substance could be raised at the hearing, when a hearing was held, and it was definitely prejudicial error to deny such hearings.)

Since defendant was deprived of the right to an administrative hearing, these cases should be remanded to the Post Office for a hearing, unless, for reasons advanced in other Points, we be granted summary judgment.

a) *In a number of cases, the demands were concededly sent 14 days or less after defendant's receipt of the complaint.*

In the cases 69 C 1363, 72 C 579-586, inclusive, 72 C 600, 72 C 601, and 72 C 610-612, inclusive, the return receipt date for the complaint either agrees with defendant's records, or, if there is a difference in date, such difference is immaterial, since in either event, the demand was not sent later than 14 days after defendant's receipt of the complaint.

Thus, in these cases, the Government clearly seeks to take advantage of the Post Office's delay in delivering mail to itself. Yet the Court below upheld the denial of the administrative hearing, improperly permitting the Government to take advantage of its own delay in delivering mail to itself.

b) *In two of the cases, there is a material question of fact as to the date of receipt of the complaint, and summary judgment should not have been granted.*

In 72 C 587 and 72 C 588, the demands for hearings were clearly timely if the defendant's records as to dates of receipt are correct (857a, 860a, 861a-863a; 964a-965a, 969a, 971a-973a), the demands having been dispatched within 14 days after receipt of the respective complaints. But if the Post Office's return receipts were correct, then the demands made by defendant were clearly late. The Court below considered this issue of fact, and resolved it in favor of the Government (977a-978a). This, of course, is directly *contra* to the decision of this Court in *Heyman v. Commerce and Industry Insurance Company*,

F. 2d (2d Cir. 1975), Docket No. 75-7230, slip-sheet opinion, page 279:

"Moreover, when the court considers a motion for a summary judgment, it must resolve all ambiguities and draw all reasonable inferences in favor of the party against whom summary judgment is sought."

Here, as in *Heyman*, there were of course cross-motions for summary judgments, but, as recited at page 281 of *Heyman*, "The well-settled rule is that cross-motions for summary judgment do not warrant the court in granting summary judgment unless one of the moving parties is entitled to a judgment as a matter of law upon facts that are not genuinely disputed."

c) *Summary judgment should not have been granted to the Government in two other cases.*

In 72 C 598, according to defendant's records, the demand was sent on the fourteenth day following receipt of the prohibitory order, while according to the Post Office, it was sent on the 15th day (1066a-1067a, 1070a). Under *Heyman, supra*, the Court below improperly resolved this factual dispute in favor of the Government. In 72 C 598, there was no factual dispute; the demand was concededly sent on the 15th. It is our contention that the demands in both cases were timely.

We are aware of no decisions prior to the rulings below which hold that a denial of an administrative hearing is permissible and is harmless error if the same result might have been reached after that administrative hearing. The right to a hearing is a fundamental, constitutionally guaranteed right under the Fifth Amendment. What can develop at a hearing is something which no one can forecast. Perhaps, indeed, some complaining addressee would have been available at a hearing, and the Government's case could have been destroyed. Mere speculation

that because upon an administrative record, improperly certified and improperly authenticated, a hearing would have been of no avail to the defendant cannot suffice to deprive the defendant of its constitutional right, especially when combined with the fact that all defenses could not be raised in the demand for hearing because the complaint failed to disclose all material facts.

POINT XI.

The Court below incorrectly upheld the denial of administrative appeals taken from the denials of hearings, which appeals were never decided.

Appeals were taken within the Post Office in a number of the cases from the Post Office's denial of the hearing, being 69 C 1363 (287a), 72 C 579 (182a-184a), 72 C 580 (381a), 72 C 581 (467a), 72 C 582 (545a), 72 C 584 (638a), 72 C 586 (735a), 72 C 587 (823a), 72 C 588 (934a), 72 C 598 (1041a), 72 C 600 (1213a), 72 C 601 (1299a), 72 C 606 (1577a), 72 C 611 (1778a), and 72 C 612 (1882a). The Post Office never acted upon those appeals. Surely, these cases must be held to have been brought prematurely in Court, while administrative appeals were still pending, and should have been dismissed. However, again the Court below ruled that the denial of an appeal was harmless error since no points of substance had been raised by the demand (opinion in 69 C 1290, p. 4), on which see our argument, *supra*, at pages 36-7.

POINT XII.

In six cases, there is no proof whatsoever that defendant ever received a prohibitory order.

The Government submitted papers to the Court purporting to be return receipts for prohibitory orders ex-

ecuted by the defendant. While the certification was silent on the relationship between the varying return receipts in each file and what was purportedly received, we assume that the earlier return receipt was allegedly the return receipt for the prohibitory order, and the later return receipt was allegedly for receipt of the administrative complaint.

However, in six of these cases (72 C 582, 72 C 584, 72 C 588, 72 C 602, 72 C 606, and 72 C 610), there was absolutely nothing to show that the earlier return receipt in that particular file was a return receipt for the prohibitory order in that case. Defendant had received about 200,000 prohibitory orders, and the Post Office had issued more than 325,000 prohibitory orders (536a-537a). It was undenied below that there was absolutely no proof whatsoever, by way of affidavit or intrinsic indication, that the return receipts in those particular files were the respective return receipts for the particulars orders. There could easily have been mix-ups at the Post Office, which could have confused one receipt with another, or with the return receipts for a complaint, or the receipt for virtually any communication between the Post Office and the defendant. Thus, there was no proof whatsoever as to the date of receipt of the prohibitory order, or, indeed, that defendant ever received it, especially in the light of the slipshod handling of return receipts at the Post Office, as shown in the Goldman affidavit (e. g., 574a-576a). In the absence of such proof, there could be no finding of a violation of that prohibitory order which would have become effective 30 days from its receipt, for there is no proof of the date of receipt, and therefore the entire proceeding must fall as being without a foundation.

The Court below resolved this problem in a case not on appeal here, 72 C 509, where it wrote as follows, at pages 7-8:

"In the absence of any suggestion that the Prohibitory Order was not in fact received, the absence from the administrative record of an explicit and self-evident cross-reference between receipt and Prohibitory Order is not of moment. The receipt is produced from official custody as the relevant receipt in association with the Prohibitory Order. Its date is appropriate, the signature is not challenged, the presence of the Prohibitory Order in defendant's files is not denied. That there might be confusion in the Post Office files does not support an inference that any particular receipt is in a false association."

Again, the Court thrusts upon the defendant the burden of proof. A factual question was raised by defendant, which, in violation of *Heyman*, the Court decides against defendant, on a summary judgment motion. While the defendant did not deny the presence of a prohibitory order in its files, because it was not under any duty to do so, the Government was under the burden of showing when that prohibitory order was received, and by failing to tie these particular return receipts in with particular prohibitory orders, it simply failed to do so.

The learned Court below went on, at page 8, to write the following:

"In the particular case, the Hull case, defendant's request for hearing removes the issue from debate. That request does not assert non-receipt of the Prohibitory Order as a ground of objection to the Complaint of violation."

Again, this misses the point. The fact that a demand for hearing was made upon receipt of a complaint does not at all show that the prohibitory order was received by the defendant on the date the Government says it was received, and that date is crucial for the Government to establish its case. An assumption in a demand for a hearing that a prohibitory order was issued is certainly not a concession that it was received on a particular day.

In the absence of any proper proof of dates of receipt of these prohibitory orders, defendant should have been granted summary judgment.

POINT XIII.

In two cases, the prohibitory orders did not identify any person or persons to whom the second mailing could not be made. Since the orders prohibited nothing, it was improper to issue an injunction requiring the compliance with a nullity.

In 72 C 598 and 72 C 606, the prohibitory orders completely failed to order that a second mailing should not be made to any named person, the space in the form for insertion of the name being left blank (1004a, 1540a). It was thus nothing but a complete nullity, unauthorized by the Pandering Law. It was not and could not possibly have been violated, since it did not prohibit mailing to any specific person. Accordingly, defendant's cross-motion for summary judgment should have been granted.

The Court below disposed of this objection in the following way, at 1617a-1618a:

"* * * if it were possible to say that the blunder could have misled the mailer, there would be much to the point, of course. But 'H.J. Malaison,' at the same address, is given above on the form as the person to whom defendant had mailed the first letter, and, hence, omission to insert the name below could not leave defendant in any doubt about the command of the Prohibitory Order with respect to further mailings." (Emphasis the Court's.)

We first note that the Court's reasoning in 72 C 606 is logically inapplicable to 72 C 598, since in 72 C 598 the address to which the first letter had gone was different than the address to which further mailings were prohibited (1004a).

What the Court below did was to incorporate the name of the addressee contained in the whereas clause into the ordering clause, when in fact the order orders absolutely nothing. The Court assumes that the name of the complaining addressee would have been inserted in the blank space, but this assumption is not warranted. Not only are there frequent instances in this record alone of variations in the name, but it would have been simply an incorrect assumption on the part of the defendant to assume that the name to whom the mailing was prohibited was that of the person to whom the first mailing had been addressed. Thus, in the undersigned's numerous files of pandering order cases, there have been instances where a husband obtained a pandering order prohibiting mailings to his wife only, or a wife obtained a prohibitory order prohibiting a mailing to the husband only, or a parent obtained a prohibitory order prohibiting a mailing only to a child, or where a mailing to a child resulted in an order prohibiting mailing to the parent, or where the administrator or executor of a deceased addressee obtained an order prohibiting a mailing to the administrator or executor, etc. The Court assumed that the law would have been properly followed in the wording of the prohibitory orders, but that assumption is belied by the actual facts.

But in any event, where an order ordered nothing, it obviously could not be violated, and no injunction should have been issued ordering compliance with a nullity.

POINT XIV.

In twelve cases, injunctions were issued where the second mailings were to individuals whose names varied from those in the prohibitory order. Since the statute does not prohibit mailings to variations in names of the addressee but only in the variation of addressee designation, defendant's cross-motions for summary judgment should have been granted, especially since the later computerization prevents any second mailing to any of these persons, and thus renders their cases totally moot.

In twelve cases, the second mailings were to names as to whom mailings had not been specifically prohibited by the prohibitory order. In some of these cases, the mailings were to persons as to whom a human judgment—impossible to use under the Pandering Law—might conceivably have been exercised to determine that they were the persons to whom mailings were prohibited, such as where the prohibitory order gave William as the first name, but the second mailing was to a Bill. Thus, in 69 C 1362 the prohibitory order prohibited a mailing to L. Ireland (7a), while the second mailing was to L. R. Ireland (16a); in 73 C 579 the order prohibited mailing to J. Mark (147a), but the second mailing was to J. Marks (146a); in 72 C 580, the order prohibited a mailing to an R. Gale Harter (340a), while the second mailing was to G. Harter (333a); in 72 C 581, there was again a material variation (433a, 430a); in 72 C 582, the order prohibited a mailing to Philip E. Sellers (514a), while the second mailing was to P. E. Sellers (512a); in 72 C 586, the order prohibited a mailing to Rev. H. Q. Griffis (698a), while the second mailing was to H. Griffis (694a); in 72 C 588, the order prohibited mailing to James Metheny (889a), while the second mailing was to J. T. Metheny (880a); in 72 C 599, the order prohibited a mailing to William Costa (1093a), whereas the second mailing was to Bill Costa (1096a); in 72 C 601, the order prohibited a mailing to Richard M. Coffin (1263a), while the second

mailing was to R. H. Coffin (1266a); in 72 C 602, the order prohibited a mailing to Anne J. Kelly (1360a), while the second mailing was to A. Kelly (1351a); in 72 C 603, the order prohibited a mailing to Bradley F. Day (1458a), while the second mailing was to B. W. Day (1455a); and in 72 C 611, the order prohibited mailing to B. W. S. Dodge (1743a), while the second mailing was to B. Dodge (1729a).

Under the computerization system as it existed at the time the second mailings were made, it was impossible to prevent these mailings, but the improvements adopted thereafter would have prevented each and every one of these mailings. Thus, the improvements in computerization effectively mooted these cases.

But in any event, it is of course utterly impossible to comply with the prohibitory order law except by use of a computer, and with these variations, before defendant adopted its 1970 and 1971 systems, the variations in names would have been read as two different persons by the computer. (For example, see how Popular Photography Magazine handles its notice to subscribers, e. g., 212a.) The only way in which the second mailing could have been prohibited was by the overcompensating presently-used computer method, based on the first five letters of the last name, tied in with the address and zip code. But since computers must necessarily be used to comply with the Pandering Law, we submit that these variations in the name mean, as a practical matter, that the second mailings must be deemed to have been made to persons other than those to whom mailings have been prohibited, for all practical purposes, and cannot be considered violations. Otherwise, the statute prohibits mailers from disseminating First Amendment materials to those who wish to receive them.

In six of the cases mentioned above (72 C 580, 72 C 599, 72 C 601, 72 C 602, 72 C 603, and 72 C 611), the

second mailing was addressed exactly as the first mailing had been addressed, as appears by the prohibitory order—but the Post Office itself had clearly failed to prohibit a mailing to the person in the form and substance to which the first mailing was made, and thus the Post Office itself was responsible for these second mailings, by its failure to prohibit mailings addressed as were the first mailings.

POINT XV.

In six of the cases, summary judgment should have been granted to defendant below, since the addresses on the second mailings were other than those to which mailings had been prohibited.

In the five cases indicated in the margin,¹² the second mailings went to street addresses other than those to which mailings had been prohibited, not an address variation intended to reach the same addressee. Therefore,

¹² Case	Prohibited Mailing Address	Address on Second Mailing
72 C 611	122 Plantation Drive Houston, Texas 77024 (1743a)	122 Plantation Rd. Houston, Texas 77024 (1729a)
72 C 587	6303 Brightlea Dr. Lanham, Maryland 20801 (787a)	7303 Riverdale Ave. Lanham, Md. J4 20801 (782a)
72 C 588	2203 Beverly Street, Box 3057 Parkersburg, West Virginia 26101 (889a)	Bx. 3057 Parkersburg, W. V. 26103 (880a)
72 C 598	404 Cambridge Circle, Or Box 3647 Halliburton Lafayette, Louisiana 70501 (1004a)	Box 3647 Lafayette, La. 70501 (1002a)
72 C 603	16 Hemlock Trail Trumbull, CT 06611 (1458a)	16 Hemlock Trl. Trumbull, CT 06611 (1455a)

there clearly was no violation in these cases. Indeed, in one of them (72 C 603) the second mailing was to the same address as that of the first mailing, this address not having been proscribed by the prohibitory order.

Moreover, in all but one of these cases (72 C 587), the second mailings were not only to addresses which the prohibitory order had not prohibited, but were also to names not proscribed by the prohibitory order (see prior point).

Though the Court below did not deal with this problem in any of the opinions reproduced here, it did deal with this problem in 69 C 1290, writing as follows (at pp. 5-6):

“3. The fact that the second mailing was to Edina rather than to Minneapolis is immaterial where the name, street address and zip code were those contained in the Prohibitory Order. The mailing reached the addressee, and that it was intended for the addressee is a necessary inference from the correspondence between the two addresses. The atlas discloses that Edina is southwest of the center of Minneapolis and about seven miles from the inner city.”

We do not quite follow the reasoning of the Court below. The human mind and the computer should not be required to behave more carefully than reasonable men behave, and we suspect that no reasonable man would have consulted an atlas before deciding that a mailing to Edina is not the same as a mailing to Minneapolis. In fact, the second mailing clearly appeared to be a different city. So, too, here the addresses listed below in the footnote for the prohibited mailing did not correspond with the addresses prohibited in the prohibitory order, and there clearly was no violation of the prohibitory order.

In another case, the second alleged mailing was to a different zip code than the one to which the mailing had

been prohibited, that is, 72 C 588. The Court below dealt with this problem in the following fashion (980a):

"* * * The difficulty with the objection is again that the letter did not miscarry when it was delivered * * *. The mailing went to the same person, and the correspondence between the two addresses are such as altogether to eliminate the possibility that the person who received the second mailing was not the one to whom the defendant intended to send it.

"It is no doubt true that defendant's methods of doing business made it difficult to avoid violation in this respect. Its computerized lists betray it on such occasions. But unfortunately defendant must be treated as though it had only a few short lists and a personal consciousness of all of its acts. Orders are directed to persons not to electronic devices. The complexity of defendant's business is not a defense against the claim of an individual addressee who has obtained an order directing defendant to make no further mailings to him * * *."

Precisely why a computerized operation must be treated as if it were a hand operation is not made clear in the ruling below. But we submit that even a person with a few short lists would, to intelligently comply with a prohibitory order, have to sort out his mailings first by proceeding through the zip code—which the Post Office constantly encourages users to use. Thus, if there were a few short lists and even normal human judgment were used, one would not find under zip code 26103, the zip code to which the second mailing was sent (880a), the name of the complaining addressee, and would thus dispatch the mail to that person. One of three things happened: either the Post Office gave an incorrect zip code, or else it changed the zip code in the interim, or else it somehow triumphed over its own zip code requirement. But whichever of these happened, it is simply unfair, if not grossly unjust, to charge a mailer with a violation of the statute when the second mailing is sent to a zip code different from that prohibited by the prohibitory order.

Conclusion.

This Court should reverse the granting of the Government's summary judgment motion in all cases, and the denial of defendant's cross-motions for summary judgment in all cases.

Respectfully submitted,

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Attorney for Defendants-Appellants.

ADDENDUM OF STATUTES.

(Pandering Law.)

39 U.S.C. §4009, PUBLIC LAW 90-206

“§4009. *Prohibition of pandering advertisements in the mails.*

“(a) Whoever for himself, or by his agents or assigns, mails or causes to be mailed any pandering advertisement which offers for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative shall be subject to an order of the Postmaster General to refrain from further mailings of such materials to designated addressees thereof.

“(b) Upon receipt of notice from an addressee that he has received such mail matter, determined by the addressee in his sole discretion to be of the character described in subsection (a) of this section, the Postmaster General shall issue an order if requested by the addressee, to the sender thereof, directing the sender and his agents or assigns to refrain from further mailings to the named addressees.

“(c) The order of the Postmaster General shall expressly prohibit the sender and his agents or assigns from making any further mailings to the designated addressees, effective on the thirtieth calendar day after receipt of the order. The order of the Postmaster General shall also direct the sender and his agents or assigns to delete immediately the names of the designated addressees from all mailing lists owned or controlled by the sender or his agents or assigns and, further, shall prohibit the sender and his agents or assigns from the sale, rental, exchange, or other transaction involving mailing lists bearing the names of the designated addressees.

“(d) Whenever the Postmaster General believes that the sender or anyone acting on his behalf has violated or is violating the order given under this section, he

shall serve upon the sender, by registered or certified mail, a complaint stating the reasons for his belief and request that any response thereto be filed in writing with the Postmaster General within fifteen days after the date of such service. If the Postmaster General, after appropriate hearing if requested by the sender, and without a hearing if such a hearing is not requested, thereafter determines that the order given has been or is being violated, he is authorized to request the Attorney General to make application, and the Attorney General is authorized to make application, to a district court of the United States for an order directing compliance with such notice.

“(e) Any district court of the United States within the jurisdiction of which any mail matter shall have been sent or received in violation of the order provided for by this section shall have jurisdiction, upon application by the Attorney General, to issue an order commanding compliance with such notice. Failure to observe such order may be punished by the court as contempt thereof.

“(f) Receipt of mail matter thirty days or more after the effective date of the order provided for by this section shall create a rebuttable presumption that such mail was sent after such effective date.

“(g) Upon request of any addressee, the order of the Postmaster General shall include the names of any of his minor children who have not attained their nineteenth birthday, and who reside with the addressee.

“(h) The provisions of subchapter II of chapter 5 (relating to administrative procedure) and chapter 7 (relating to judicial review) of part I of title 5, United States Code, shall not apply to any provisions of this section.

“(i) For the purposes of this section—

“(1) mail matter, directed to a specific address covered in the order of the Postmaster General,

without designation of a specific addressee thereon, shall be considered as addressed to the person named in the Postmaster General's order; and

“(2) the term ‘children’ includes natural children, stepchildren, adopted children, and children who are wards of or in custody of the addressee or who are living with such addressee in a regular parent child relationship.”

(b) The table of contents of chapter 51 of title 39, United States Code, is amended by adding at the end thereof—

“4009. Prohibition of pandering advertisements in the mails.”

SEC. 302. The provisions of this title shall become effective on the one hundred and twentieth day after the date of enactment of this Act.

Rule 44(a) of the Federal Rules of Civil Procedure.

Rule 44. Proof of Official Record.

(a) AUTHENTICATION.

(1) *Domestic.* An official record kept within the United States, * * * or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied by a certificate that such officer has the custody. The certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office.

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